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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARJORIE CHARRON, et al.,

Plaintiffs,

07 Civ. 6316 (CM)(RLE)

-against-

PINNACLE GROUP NY LLC, et al.,

Defendants.

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MEMORANDUM ORDER ACCEPTING THE MEMORANDUM DECISION AND ORDER OF THE HON. RONALD L. ELLIS, U.S.M.J., DATED DECEMBER 22, 2010, AS A REPORT AND RECOMMENDATION THAT THE PROPOSED INTERVENORS' MOTION FOR LEAVE TO INTERVENE IN SETTLEMENT DISCUSSIONS BE DENIED; TREATING THE NOTICE OF APPEAL TO THE SECOND CIRCUIT FROM JUDGE ELLIS' ORDER AS AN OBJECTION TO THE MAGISTRATE JUDGE'S RECOMMENDATION THAT THE MOTION FOR LEAVE TO INTERVENE BE DENIED; GRANTING THE MOTION FOR LEAVE TO FILE OBJECTIONS (STYLED AS A "NOTICE OF APPEAL") OUT OF TIME; ACCEPTING THE REPORT AND ADOPTING SAME AS THE COURT'S OPINION; AND DENYING THE MOTION FOR LEAVE TO INTERVENE.

McMahon, J.:

The above captioned action is pending before me. The matter has been referred to The Hon. Ronald L. Ellis, U.S.M.J., for settlement discussions, with the consent of all parties to the lawsuit.

On or about November 29, 2010, the court received a motion from a group of persons calling themselves the United Co-op Housing Shareholder Coalition. The group, which is purportedly led by one Abram Gin, sought leave to intervene in this action for the purpose of participating in settlement negotiations. I referred the motion to Judge Ellis, who denied it in a Memorandum Opinion and Order that was docketed on December 22, 2010 (Docket #112).

I have today received from the Clerk of the Court a Notice of Appeal to the Second Circuit. (Docket # 113). The caption is styled "Abram Gin, James Jennett, Alla Grinshpon, Howard Schwartz et al. v. Joel Wiener, Jenner & Block LLP, Richard Levy, Esq., Luke McLoughlin, Esq., The City of New York, The Public Advocate of the City of New York et al." Obviously, that is not the title of this action; this caption includes in its text numerous persons

Copies handed to counsel on 1/21/11

who are not in fact parties to the lawsuit. However, Mr. Gin et al. are the parties who moved for leave to intervene, and the purported appeal to the Second Circuit is from Judge Ellis' Memorandum Opinion and Order denying that motion.[1]

The Notice of Appeal on its face states that it was hand delivered to the Court on 1/12/2011, and notes that it was electronically filed on 1/13/2011, which is more than 14 days but less than 30 days from the date of Judge Ellis' order. On the face of the Notice the parties identified as "plaintiffs" (which they are not, they are proposed intervenors) ask for an extension of time in accordance with Rule 4(a)(5) of the Federal Rules of Appellate Procedure. I assume that is why the papers were sent to me.

This document creates something of a procedural morass, but I sort it out as follows:

An immediate appeal lies from an order denying leave to intervene. Ionian Shipping Co. v. British Law Ins. Co., 426 F. 2d 186, 189 (2d Cir. 1970).; citing Fox v. Glickman Corp., 355 F. 2d 161, 163 n.2 (2d Cir. 1965), *cert denied sub nom.* Levy v. Glickman Corp., 384 U.S. 960 (1966). Therefore, if Judge Ellis had jurisdiction to hear and determine the motion for leave to intervene, his order could be appealed directly to the Court of Appeals, which is what proposed intervenors have purported to do.

However, the Second Circuit has held that a United States District Judge, not a United States Magistrate Judge, must make the final determination on a motion to intervene as of right -- even where the original parties had agreed to have the action referred to a Magistrate Judge for all purposes. New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc. et al., 996 F. 2d 21 (2d Cir. 1993). Proposed intervenors did not consent to have Judge Ellis finally determine the issue of intervention. I must, therefore, treat his Memorandum Decision and Order as a Report and Recommendation; it is not actually a decision and order.

As a result, proposed intervenors' Notice of Appeal to the United States Court of Appeals is a nullity. I shall, however, treat the Notice of Appeal as an Objection to the learned Magistrate Judge's Report and his Recommendation that the motion for leave to intervene be denied.

Insofar as the timeliness of the objections is concerned: objections to a Report and Recommendation from a Magistrate Judge must be taken within fourteen days after the Report is served. 28 U.S.C. § 636(b)(1)(C). Service was effected by mail on December 22, 2010. It is the date of mailing, not of receipt, that matters, so the document styled Notice of Appeal, treated as an objection, was not timely filed. However, as the learned Magistrate Judge did not indicate in his decision was a Report and Recommendation, or that objections had to be addressed to me rather than to the Court of Appeals, or set out the time for taking an appeal, the court GRANTS the motion for an extension of time, and treats the Notice of Appeal as an Objection to Judge Ellis' recommendation that the motion for leave to intervene be denied.

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[1] Ths appeal purports to be from Judge Ellis'a Memorandum Opinion and Order dated December 22, 2010 "and modified on 12/30/2010." The docket shows no subsequent order modifying Judge Ellis' original decision and order and his chambers confirms that there has been no such modification.

After reviewing the record on the motion (which is appended to the "Notice of Appeal"), I am going to expedite matters by entering an order summarily accepting Judge Ellis' Report and adopting it as the decision of the court on the motion for leave to intervene. For the reasons set out in the Memorandum Decision and Order, Judge Ellis' conclusion that proposed intervenors (1) do not satisfy the criteria for intervention as of right, and (2) fail to make any showing that they should be allowed to intervene by permission, are manifestly correct. It seems clear from the record submitted along with the "Notice of Appeal" that intervenors are trying to inject themselves into this lawsuit (to which they are not parties) because they are engaged in a long-running dispute with class counsel over whether class counsel are representing intervenors' interests (they are not, and no matter what Mr. Gan and his confreres say or think, they cannot, because they have been appointed by this court to represent the interests of a specifically defined class of Pinnacle tenants whose interests may well not be the same as those of the proposed intervenors). I gather that proposed intervenors are also residents of the buildings that are the subject of this litigation, and they may have their own grievances against the defendants (I mean the real defendants – the Pinnacle Group and Joel Wiener – not the parties who are listed as "defendants" in the "caption" on the "Notice of Appeal"). But they are not rent-regulated tenants, and this action seeks relief on behalf of rent-regulated tenants for harassment allegedly designed to get them out of their apartments so that those apartments can be re-rented at market rates. Any settlement of those claims is, frankly, none of proposed intervenors' business.

Therefore, Judge Ellis correctly concluded that the intervenors' motion for leave to intervene for the sole purpose of participating in settlement discussions (which is the relief sought by proposed intervenors) should be DENIED. I endorse and adopt the recommendation of the learned Magistrate Judge.

For the reasons stated in Ionian Shipping, an immediate appeal to the Second Circuit lies from THIS order, albeit not from Judge Ellis' order (which was really not an order, but a recommendation). Proposed intervenors are advised that they have thirty days from today's date within which to file a new Notice of Appeal to the United States Court of Appeals for the Second Circuit. The Notice of Appeal should be filed in the office of the Clerk of the District Court. Proposed intervenors must file a new notice of appeal; they cannot rely on the document they filed on January 13 as their Notice of Appeal.

Furthermore, proposed intervenors MUST use the correct caption of this action when they file their new Notice of Appeal. They are not authorized to add new parties to this case, either as plaintiffs (they are not plaintiffs in this action) or as defendants (Jenner & Block, its attorneys and the City are not defendants in this action). The Clerk of the Court is ordered NOT to issues summonses or permit service of process on the law firm of Jenner & Block LLC, on the two attorneys who are listed in the incorrect caption used by proposed intervenors, on the City of New York or on the Public Advocate.

For proposed intervenors' benefit, the correct caption (the one they must use) reads as follows:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Marjorie Charron et al.,

Plaintiffs,

-against- 07 Civ. 6313 (CM)(RLE)

Pinnacle Group NY LLC et al.,

Defendants.

Abram Gin et al.,

Proposed Intervenors.

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This constitutes the decision and order of the court.

Dated: January 21, 2011

U.S.D.J.

BY ECF TO ALL COUNSEL AND TO MAGISTRATE JUDGE ELLIS

BY FIRST CLASS MAIL TO PROPOSED INTERVENORS
AT THE FOLLOWING ADDRESS:

Abram Gin
99-40 63rd Road, Apartment 3Z
Rego Park, NY 11374